IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1810 OF 2006

Ms.Akanksha Amar Naik ..Petitioner

Vs.

Government of India,
Ministry of External Affairs
and Others ..Respondents

Mr.Meghashyam Kocharekar for the petitioner

Ms.S.D.Shinde, A.P.P. for the state

Mr.D.N.Salvi for Union of India

CORAM : J.N.PATEL &
SMT.ROSHAN S.DALVI, JJ.

DATED : 4TH OCTOBER, 2006

ORAL JUDGEMENT (PER J.N.PATEL, J):

1. Rule, returnable forthwith.

2. The learned counsel for the respondents waives service.

3. Heard the learned counsel for the parties.

4. A short question which arise for our consideration is whether the impugned decision by respondent no.1 communicated vide letter dt.14.6.06 to the petitioner by the Regional Passport Office that her case has been "not recommended" by the Deputy Commissioner of Police SB-II, C.I.D.Mumbai for issue of passport and, therefore, it has been decided not to grant passport facilities to her is not in accordance with law and is violative of Article 14, 19 and 21 of the Constitution of India and if so, whether the petitioner is entitled to have passport facilities as applied for by her from respondent no.1?

5. The petitioner is daughter of late Amar Naik and is a citizen of India. On completion of Higher Secondary Education i.e. 12th Standard, she wants to become a pilot and for that purpose she intends to join commercial Pilot Training Programme at Canada where she got admission in Abbotsford Flight Centre Ltd which institute conducts commercial pilot training programme. The said centre confirmed her enrollment for commercial

pilot training programme for the duration of 7 months commencing from May, 2006. (The petitioner has annexed a copy of the letter dt.16.3.06 received from the said institute confirming her enrollment which is at Exhibit - B to the petition).

6. It is the case of the petitioner that the petitioner decided to join commercial pilot training programme and for that she was required to travel to Florida. So she applied to the Regional Passport Office i.e. Respondent no.1 for issuing passport to her to travel abroad for joining commercial pilot training programme. The petitioner forwarded her application in the prescribed form and also paid fees required for the same. (A xerox copy of the same is annexed as Exhibit - C to the petition).

7. It is the case of the petitioner that she was shocked and surprised to receive the impugned communication from respondent no.1 refusing to grant passport facility to her as on earlier occasion i.e. in the year 1999 when she had

applied for passport for the purpose of visiting Australia to participate in the competition of Judo-Karate, the passport authority had issued to her passport for the period 2.8.99 to 13.5.01 and accordingly, the petitioner had visited Australia and participated in the events of Judo-Karate. (A copy of the said passport is annexed to the petition as Exhibit - A). However, the petitioner had not renewed the passport which was issued earlier in an identical situation and circumstances. It is the case of the petitioner that as the respondent no.1 rejected her application for issuance of passport, the petitioner lost the opportunity to join the commercial pilot training programme.

8. According to the petitioner, the respondent no.1 without giving any opportunity to the petitioner rejected her application for providing passport facility mainly for the reason that her case was not recommended by the respondent no.2 for issuance of passport. It is also contended by the petitioner that the respondent no.2 also did not disclose or assign any reason as to why they have

not recommended her case for granting the passport facility and therefore, denial of passport to her without giving an opportunity of hearing and giving justifiable reasons was not only unfair and unreasonable but the decision is arbitrary and in violation of the fundamental rights of the petitioner under Article 19(1) and 21 of the Constitution of India.

9. It is the case of the petitioner that the refusal to grant passport facilities to the petitioner restrained her liberty to travel abroad and join the professional course as a commercial pilot which further violates the fundamental rights guaranteed under Article 19(2) and 19(6) of the Constitution of India.

10. The petitioner has expressed in the petition her apprehension that the respondent no.2 might have considered the past record of her deceased father for recommending passport facility to her otherwise there is no reason why the petitioner’s case should not have been recommended for issuance of passport facility. It is submitted

that the petitioner's case does not suffer from any disability to disentitle her for a passport. It is the case of the petitioner that the respondent no.1 should be directed to reconsider her case and issue passport facilities to the petitioner as she desires to join the next Training Programme of the Commercial Pilot from the said institute i.e. Abbotsford Flight Center Ltd., as the petitioner has already lost one opportunity on account of refusal of passport facility to the petitioner. She is left with no other equally efficacious remedy available to the petitioner than to approach this court by invoking its extraordinary Jurisdiction under Article 226 of the Constitution of India.

11. On being served with the notice, D.B.Mahajan, Superintendent, Regional Passport Office filed an affidavit in reply on behalf of respondent no.1 wherein they have reiterated their stand as stated and communicated in the impugned communication Exhibit - D i.e. the petitioner's application for passport has been rejected by the respondent no.1 on the basis of the Police report

issued by the Deputy Commissioner of Police, Special Branch II, C.I.D.Mumbai which communication was received from respondent no.2 by respondent no.1 on 25.5.06 and as the case has not been recommended by respondent no.2, her application has been rejected by respondent no.2 and therefore, the petition deserves to be dismissed. It has been specifically denied that the order rejecting the passport facility to the petitioner is arbitrary, unfair and unreasonable as alleged in the petition.

12. On behalf of respondent no.2 and 3, an affidavit of Jayprakash Nagapa Giram, Senior Police Inspector, Officer-in-charge of Passport Branch, S.B.-II, C.I.D.Mumbai came to be filed. According to the police officer in charge of Passport Branch, their office received a report from Senior Inspector of Police, N.M.Joshi Marg Police Station vide their O.W.No.3156/06 dt.3.4.06 in which it was stated that the applicant is a daughter of Notorious Gangster Late Amar Naik and Senior Inspector of Police, N.M.Joshi Marg Police Station has further apprehended that, if issued with a passport facility, applicant’s passport may be

utilised for aiding and abetting criminal activities of associate members of her father’s gang. It was further apprehended that applicant’s passport may be utilised for the activities prejudicial to the security and sovereignty of India and for activities prejudicial to the friendly relations with other countries. On receipt of the said report, the case was referred to D.C.P. (Detection), C.I.D.Mumbai as the matter pertained to notorious gangster’s daughter. The D.C.P. (Detection) C.I.D.Mumbai opined vide their letter O.W.No.935/DCP/(Det) dt.6.5.06 that "as the applicant’s father Later Amar Naik was a notorious gangster and at present her uncle Ashwin Naik is carrying on gangland activities of her father’s gang, there is a possibility of applicant’s passport being misused for aiding and abetting criminal activities of associate members of said gang who were wanted and absconding" and hence her case was ’not recommended’ for issuance of passport. Sr.P.I. Jayprakash Nagappa Giram has annexed both the communication alongwith reply at Exhibit - A and B.

13. In view of the fact that the impugned communication from the passport office stated reasons for not permitting to grant passport facilities to the petitioner as her case was 'not recommended' by the D.C.P.S.B.-II, C.I.D.Mumbai, this court specifically directed the concerned officer to file his affidavit in reply. On being so directed, the D.C.P. S.B.-II, C.I.D.Mumbai filed his affidavit and reiterated the same reason for not recommending her case for providing passport facility and has annexed the report of Sr.P.I., N.M.Joshi Marg Police Station and D.C.P.(Detection) C.I.D.Mumbai alongwith the list of cases against Amar M.Naik. In so far as father of the petitioner is concerned, i.e. Amar M.Naik, it is not disputed that he has been killed in police encounter and is dead.

14. Mr.Kocharekar, the learned counsel for the petitioner submitted that the petitioner has no criminal record nor there is any material to show that she is in any manner associated with the alleged organised crime syndicate of her deceased father Amar M.Naik or her uncle Ashwin Naik and

therefore, merely because several cases were pending against her deceased father Amar Naik and her uncle Ashwin Naik cannot be a ground for denying passport facilities to the petitioner. Mr.Kocharekar drew attention of this court to a decision rendered in the case of **Deepak Sadashiv Nikalje v. Union of India and others reported in AIR 2003 BOMBAY 255** wherein this court had an occasion to consider the case of the petitioner Deepak Sadashiv Nikalje whose real brother is alleged to be running Organised Crime Syndicate and known as Chota Rajan and for that reason Police Authorities have not recommended his case for passport for similar reasons and that this court quashed and set aside the decision of the respondent and directed the authorities to issue passport to the said Deepak S.Nikalje on imposing certain conditions. Therefore, there is no reason why the petitioner should be denied passport facility merely because she happens to be the daughter of deceased Amar Naik, who according to the police was a notorious gangster running a Organised Crime Syndicate and therefore, the impugned order deserves to be quashed and set

aside.

15. The learned counsel for the Union of India submitted that their decision is based on adverse police reports and as the respondent no.2 in their report did not recommend the case of the petitioner for providing passport facilities for the reasons stated therein they were justified in rejecting the application for passport u.s.6(1) and (2) of the Passports Act, 1967 as the adverse reports mention that the applicant may, or is likely to engage in activities prejudicial to the security and sovereignty of India and activities prejudicial to the friendly relations with other countries which is a ground for rejecting passport facilities us.6(2)(b) of the Passports Act, 1967.

16. The learned P.P. appearing for the respondent no.2 submitted that before the passport is issued to any person, the passport authorities normally get the verification report from the police department i.e. the office of the D.C.P. S.B. - II, C.I.D.Mumbai if it relates to issuance of passport by the Regional Passport Office,

Mumbai. It is submitted that in view of the fact that the petitioner is a daughter of deceased, Amar Naik, who was a notorious gangster and was running an Organised Crime Syndicate known as Amar Naik Gang, the authorities were justified in not recommending her case and therefore, apprehension is based on the material placed on record i.e. the cases pending against Amar Naik Gang in which Amar Naik was involved and also Ashwin Naik who is the real uncle of the petitioner as can be seen from the list furnished alongwith affidavit in reply filed by the D.C.P. S.B.-II, C.I.D.Mumbai.

17. The learned P.P. further pointed out to this court that on earlier occasion for providing passport facilities to the children of all persons having criminal record were required to be cleared by referring it to the Ministry of External Affairs and placed on record two letters addressed by the Under Secretary, Ministry of External Affairs in respect of passport facilities to the children of accused in Bomb Blast case dt.20.8.01 and the other dt.4.3.02 regarding passport facilities to Smt.Fruitwala Idrees Banu Nathu Aziz, mother-in-law

of Gangster Chota Shakeel.

18. The learned counsel for Union of India submitted that the circular has been withdrawn by the Ministry of External Affairs of which due communication has been sent vide letter dt.22.8.03 to respondent no.2 and also to the Regional Passport Officer by letter dt.13.6.03. A xerox copy of the same was tendered to us and therefore, there was no legal impediment in the way of respondent no.2 who has not considered the case of the petitioner for grant of passport and that their recommendation carries lot of weight in issuing passport facilities to the applicants.

19. This court made a specific query to the learned P.P. to place on record or atleast make it available to this court for its eyes only, any intelligence report, material or secret information which would show any association or complicity of the petitioner concerned with the illegal and nefarious activities of the Organised Crime Syndicate of notorious gangster deceased Amar Naik or Ashwin Naik who is uncle of the petitioner as

primarily the reason given for not recommending the case of the petitioner is the relationship of the petitioner to the persons who are leading this Organised Crime Syndicate on the basis of which the respondent no.2 has stated that there is a possibility of applicant's passport being misused for aiding and abetting criminal activities of associate members of said gang who are wanted and absconding. Further incase the passport is issued to the petitioner, it is likely to be misused for facilitating/abetting criminal acts of other members of the organised crime syndicate in India and abroad and thereby posing threat to the sovereignty and integrity of India and activities prejudicial to the friendly relations with other countries.

20. The learned P.P. fairly conceded that there is no intelligence report or material to substantiate such an apprehension as expressed in the affidavit filed by respondent no.2 and his officers and other police officers on behalf of respondent no.2. In view of the statement, it is evident that the respondent no.2's adverse report

in case of the applicant for issuance of passport facilities as "not recommended" is without any basis, shows non application of mind on the part of the respondent no.2 in not recommending the case of the petitioner and such a decision taken by them on the basis of no material only goes to show that it is taken in an arbitrary manner which is unjust and unfair to the petitioner.

21. In case of Deepak S.Nikalje, the petition was filed challenging the decision of the Regional Passport Authority and the appellate authority under the Passport Act for denying passport facility to the petitioner in which it was found that the order passed by the Regional Passport Authority and the Appellate Authority was not sustainable in law and cannot be maintained since there is no material against the petitioner which would justify denial of passport to him and in case of Deepak S.Nikalje some proceedings were initiated u.s.56 of the B.P.Act externing him from Mumbai. Though the said Externment Order was never implemented, the court found it necessary to impose certain conditions while directing the Regional

Passport Authority to provide passport facilities to the petitioner. This court in Deepak S.Nikalje case referred to the case of Smt.Maneka Gandhi v. Union of India and anr. reported in AIR 1978 SC 597 wherein it held that as Maneka Gandhi was not given an opportunity of hearing before her passport came to be impounded, the said decision was quashed and set aside and it held that

> "It is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that article and Art.19 (1). The expression 'personal liberty' in Art.21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art.19.....
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> "It will be seen at once from the language of Art.21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law heremeans 'enacted law' or 'State law'. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. Obviously, the procedure cannot be arbitrary, unfair and unreasonable.....

> "If a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Art.21 has to stand the test of one or more of the fundamental rights conferred under Art.19 which may be applicable in a given situation, ex. hypothesi it must also be liable to be tested with reference to Art.14.....
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> "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non arbitrariness pervades Art.14 like a brooking omnipresence and the procedure contemplated by Art.21 must answer the test of reasonableness in order to be in conformity with Art.14. It must be 'right and just and fair' and not arbitrary, fanciful or opressive; otherwise, it should be no procedure at all and the requirement of Art.21 would not be satisfied."

22. We may refer to the decision of the five Judge bench of the Supreme Court in the case of Satwant Singh Sawhney v. D.Ramarathnam Assistant Passport Officer, New Delhi and others reported in AIR 1967 SC 136 when the Supreme Court discussed the issue in reference to Article 21, 14 and 19 and held that right to travel abroad is a fundamental right and absence of law regulating such right and refusal of passport, or withdrawal of one given violates Arts. 21 and 14. The ratio of the decision in Satwant Singh Sawhney that the case can

be culled out from the head note and reads as under:

> "Per Majority (Hidayatullah, J), and Bachawat, J. Contra): Right to travel abroad is fundamental right. Since there is no law regulating or depriving person of such a right, refusal to give passport or withdrawal of one given violates Arts. 21 and 14. The reasons are:
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> (1) Theoretical possibility of exit from India for foreign travel is expressly restricted by executive instructions to shipping and airlines companies and by refusal of foreign exchange. An Indian passport is factually a necessary condition for travel abroad and without it no person residing in India can travel outside India. The Indian Government, by refusing a passport to a person residing in India, completely prevents him from travelling abroad.
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> (2) The expression "personal liberty" in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art.19. Under Art.21 no person can be deprived of his right to travel except according to procedure established by law."

23. Therefore on facts what we find is that the respondent no.2, without there being any material in their possession or within their knowledge, did not recommend the case of the petitioner to the

respondent no.1 for providing her with passport facility merely for the reason that she is the daughter of deceased Amar Naik who was a notorious gangster on the basis of which the respondent no.1 rejected the application of the petitioner. The said order having been passed without application of mind is not only arbitrary, unfair or unreasonable but such decision has been taken contrary to the procedure established by law i.e. provisions in the Passport Acts and Rules. The apprehension expressed by respondent no.2 (being based on no material) by itself does not disqualify the petitioner under section 6 of the Passports Act, 1967 for being provided with passport facility and therefore, we quash and set aside the impugned order and allow the petition. Rule is made absolute in terms of prayer clause (a). Respondents are directed to re-consider the case of the petitioner and issue passport facilities to her after re-examining her case within the period of 4 weeks from the date of passing of this order. Petitioner shall also be entitled for costs from the respondents.

(SHRI J.N. PATEL, J)

(SMT.ROSHAN DALVI, J)